

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Review of the Commission's Broadcast and)	MM Docket No. 98-204
Cable Equal Employment Opportunity)	
Rules and Policies)	

To: The Commission

**JOINT REPLY COMMENTS ON THIRD NOTICE OF
PROPOSED RULE MAKING**

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SUMMARY

This proceeding is not about which segment of the communications industry in America has the strongest commitment to nondiscrimination and recruitment outreach. Nor is it about what jobs deserve protection against unlawful discrimination. Clearly, they all do. This proceeding is also not about whether broadcasters must afford equal opportunity in employment to all qualified applicants. Clearly, they must. The State Associations have never quarreled with the important goals of nondiscrimination and broad recruitment outreach. Where the State Associations do have a quarrel is whenever government adopts regulations that are either without authority, unnecessary, inappropriate, ineffective, inefficient and/or unduly burdensome. That is the State Associations' perspective in this proceeding.

As made clear in their initial Joint Comments, the State Associations fully support the goal of broad outreach for employment in the broadcast industry and have historically assisted radio and television stations to practice, on a voluntary basis, broad outreach in their recruitment efforts. Indeed, in their Joint Comments in both the *Second R&O*, *Third NPRM*, and elsewhere, the State Associations proposed a broad outreach program based on the use of the Internet to promote a speedy, convenient, and direct job search and hiring process that would not be unduly burdensome for the public, broadcasters, the Commission, or anyone else. However, the Commission has to date rejected this direct communications approach, instead preferring intermediaries ("referral sources") to bring applicants and broadcasters together. As a result, the Commission is in effect forcing broadcasters to rely heavily upon third-party middlemen whose interest in performing a meaningful referral role may be more assumed than real and whose own information dissemination procedures are more likely measured in weeks or months, rather than in minutes or hours. As a consequence, the broadcaster's costs, burdens, and regulatory risks increase substantially with no real offsetting public interest benefit.

It is evident from the State Associations' analysis set forth herein that performance of the many regulatory induced tasks will require additional heavy staff time and impose major recordkeeping and reporting burdens on all broadcasters, and such burdens will fall disproportionately on smaller and mid-sized broadcasters. Based on this, even the most conservative estimates indicate that performance of all of the tasks reasonably related to the requirements of the new EEO Rule will require between 1 and 2 full-time staff persons, not including the need to detail more staff on an as needed basis. Accordingly, simple arithmetic compels the conclusion that any effort to expand the applicability of the new EEO Rule to part-time positions – positions which turn over much more frequently than full-time positions – will increase *dramatically* the staff time and personnel needed to properly perform all of the tasks required under the new EEO Rule.

The proponents of extending the new EEO Rule to part-time positions present no meritorious justification for the Commission to depart from its historical focus on full-time positions. No statute compels the Commission to extend the new EEO Rule to part-time positions. The fact that part-time positions may serve as a gateway to a career in broadcasting is not determinative. The extension of the new EEO Rule to part-time positions will increase significantly the burdens and risks for all broadcasters. The argument that broadcasters will seek to evade the requirements of the new EEO Rule unless it is applied to part-time positions is not responsive to the problem. The problem is not recruitment; it is recordkeeping, reporting and the regulatory risks unnecessarily created by the Commission's approach whenever there is an opening to fill. If the proponents are correct that there is an incentive for broadcasters to avoid triggering the rule, the consequences of that incentive will not stop at the door of part-time positions. Rather, under their own argument, more temporary help will be enlisted by stations. More tasks will be outsourced. There will be more LMAs and more consolidation. All of this will mean fewer jobs. The solution is to fix the rule, not expand its reach. It is absurd to think

that the extension of the recruitment, recordkeeping, and reporting requirements of the new EEO Rule will actually minimize the regulatory burden on broadcasters.

A decision not to extend the new EEO Rule's requirements to part-time positions eliminates the need for the Commission to deal with and resolve a number of thorny issues, such as defining the minimum number of hours for part-time positions, what would constitute "substantial compliance," and what effect the inclusion of part-time positions would have on the "less than 5 full-time employee" exemption for SEU's. Such a decision would also avoid adding pressure on stations to outsource as many of their functions as possible, to enter into LMAs and to consolidate.

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The Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Maryland/DC/Delaware Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters,

Radio Broadcasters Association of Puerto Rico, Rhode Island Association of Broadcasters, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, Wisconsin Broadcasters Association, and the Wyoming Association of Broadcasters (collectively, the “State Associations”), by and through their attorneys, and pursuant to Sections 1.415 and 1.419 of the Commission’s Rules, 47 C.F.R. §§ 1.415, 1.419, hereby jointly reply to comments filed in response to the *Third Notice of Proposed Rule Making* (“*Third NPRM*”) which proceeding was commenced at the same time the Commission adopted new EEO regulations in the *Second Report and Order and Third Notice of Proposed Rule Making*, released November 20, 2002, FCC 02-303 (“*Second R&O*”). The participation of the State Associations in this proceeding is without prejudice to any position any of them may take in connection with the *Second R&O* and the regulations adopted thereunder.

INTRODUCTION

Those filing in support of extending each of the outreach, recordkeeping, and reporting requirements of the new EEO Rule to “part-time” positions include: the American Women in Radio and Television, Inc. (“AWRT”), the National Organization for Women, NOW Legal Defense and Education Fund, Feminist Majority, Philadelphia Lesbian and Gay Task Force and the Women’s Institute for Freedom of the Press (collectively, “NOW *et al.*”), and the organizations identified collectively as the “EEO Supporters.” The National Cable & Telecommunications Association supports extension of the new EEO Rule requirements to only those permanent part-time positions whose employees regularly work a minimum of 25 hours

per week and not to any other part-time employees, to any temporary employees, or to any employees of companies that contract with cable operators to provide services.

Forty-eight (48) State Associations have spoken out in opposition to extending any of the requirements of the new EEO Rule to part-time positions. The Curators of the University of Missouri opposed the extension of the new EEO Rule requirements to part-time positions and urged the Commission, at the least, to exempt part-time positions at stations licensed to educational institutions. The National Association of Broadcasters supported the application of a “substantial compliance” policy to part-time positions. The Comments of the American Cable Association have been placed among all of these Comments but are in the nature of a Petition for Reconsideration or Clarification of the *Second R&O*, and therefore are not pertinent to this proceeding and should be referred to the *Second R&O* proceeding.

BACKGROUND

This proceeding is not about which segment of the communications industry in America has the strongest commitment to nondiscrimination and recruitment outreach. Nor is it about what jobs deserve protection against unlawful discrimination. Clearly, they all do. This proceeding is also not about whether broadcasters must afford equal opportunity in employment to all qualified applicants. Clearly, they must. The State Associations have never quarreled with the important goals of nondiscrimination and broad recruitment outreach. Where the State Associations do have a quarrel is whenever government adopts regulations that are either without authority, unnecessary, inappropriate, ineffective, inefficient and/or unduly burdensome. That is the State Associations’ perspective in this proceeding. In a Joint Petition for Reconsideration and Clarification to be filed later this week, it will be shown that even assuming *arguendo*, for

example, that the Commission had the authority to adopt this particular new EEO Rule and that the Commission did not act unreasonably in adopting the rule without simultaneously determining whether FCC Form 395-B reports will be required, the new EEO regulations are simply not reasonable in terms of effectiveness, efficiency, burdens and risks, whether from the perspective of those who are to benefit from them, those who are to be regulated by them, or the Commission which is to enforce them. In fact, the extension of those regulations to part-time positions would heighten their unreasonableness.

As made clear in their initial Joint Comments, the State Associations fully support the goal of broad outreach for employment in the broadcast industry and have historically assisted radio and television stations to practice, on a voluntary basis, broad outreach in their recruitment efforts. Indeed, in their Joint Comments in both the *Second R&O*, *Third NPRM*, and elsewhere, the State Associations proposed a broad outreach program based on the use of the Internet to promote a speedy, convenient and direct job search and hiring process that would not be unduly burdensome for the public, broadcasters, the Commission or anyone else. However, the Commission has to date rejected this direct communications approach, instead preferring intermediaries (“referral sources”) to bring applicants and broadcasters together. As a result, the Commission is in effect forcing broadcasters to rely heavily upon third-party middlemen whose interest in performing a meaningful referral role may be more assumed than real and whose own information dissemination procedures are more likely measured in weeks or months rather than in minutes or hours. As a consequence, the broadcaster’s costs, burdens and regulatory risks increase substantially with no real offsetting public interest benefit. The Joint Petition for Reconsideration and Clarification will provide a more detailed discussion of this point.

In determining whether extension of the new EEO Rule to part-time employees is warranted, the Commission must consider the relative ineffectiveness, inefficiencies, burdens and risks under the new EEO Rule in comparison to the effectiveness, efficiencies and minimal burdens and risks under the State Association's "Internet Plus" proposal. In short, the Commission's choice of a decidedly inferior approach substantially weakens the argument of those who are in favor of extending the inferior approach to part-time positions.

Under the State Associations' "Internet Plus" proposal, every AM, FM, TV, Class A, and International broadcast station which belongs to a station employment unit ("SEU") with five or more full-time employees, would be required to: (i) post its full-time job openings (no objection to "all" full-time openings so long as they are subject to a properly defined "exigent circumstances" exception) on one or more web sites, such as its own web site, the web site of its State Association, the web site of the National Alliance of State Broadcasters Associations ("NASBA"), the web site of the NAB, or of others; (ii) carry over-the-air announcements urging all listeners and viewers who have an interest in a career in broadcasting to "click on" the web site or sites which the SEU uses (and whose URL addresses are provided in the spot) so that all can learn more about broadcast careers, can check out existing openings and post their own resumes; (iii) give due consideration to all applications and other expressions of interest received by whatever means; (iv) carry over-the-air announcements inviting referral organizations to contact the station if they wish to be included on the station's "mailing list" of job opening announcements; and (v) routinely send those announcements to such referral organizations.

Under this "Internet Plus" plan, every viewer and listener within the service areas of broadcast stations throughout the United States would know where they could conveniently go, not only to obtain the most up-to-date information on job availabilities, but also to send a

resume, application, or other expression of interest for immediate consideration. In addition, as a “safety valve” measure for more inclusiveness, all referral organizations requesting job opening information could count on receiving such information on a routine basis so that they could inform the groups and individuals that they represent. The “direct-communications-to-millions-of-job-seekers” prong of the State Associations’ “Internet Plus” proposal would offset the inefficiencies of having to rely primarily (as the current rule contemplates) upon referral organizations whose reach is typically very limited and whose own information dissemination practices are too slow to be meaningful where job vacancies need to be filled with reasonable dispatch.

This direct to the applicant process would be geographically boundless, very convenient for the person who counts the most, namely the prospective applicant, and would be extremely efficient for broadcasters who are under pressure to fill each position, and the least burdensome to all concerned. The recordkeeping would be essentially paperless without sacrificing effectiveness. This dual Internet/referral organization approach would therefore reduce the recordkeeping/reporting disincentives contained in the current rule. Another benefit to the State Association’s “Internet Plus” proposal would be that, as a result of combining Internet posting with “safety valve” notices to local referral organizations, every SEU, every member of the public, and the Commission itself would always know when the SEU’s outreach efforts were legally adequate. Of course, any SEU could choose to add other recruitment sources which had not come forward in response to the on air promotional announcements.

In determining whether to extend each of the three requirements of the new EEO Rule to part-time positions, the Commission must consider the ineffectiveness, inefficiencies, burdens and risks inherent in the approach it has chosen to pursue in its new EEO Rule. First, no SEU or

member of the public will ever know for sure when an SEU's dissemination efforts are legally adequate since there is no minimum, standardized, uniform, dissemination technique or methodology that must be used to communicate the fact of these job openings. As a result, there will be constant uncertainty over whether the efforts were wide enough, broad enough, or inclusive enough. Such uncertainty is certain to result in repeated requests for guidance from the Commission, numerous complaints that particular stations have not done enough, and frequent litigation before the FCC. Second, as demonstrated by the State Associations in their opening Joint Comments, the approach taken by the Commission under its new EEO Rule contains a strong internal disincentive for stations to practice the widest, most diverse, and most frequent dissemination possible to fill all applicable positions.

To be specific, the outreach component of the new EEO Rule contains three prongs: (i) a core obligation to widely disseminate information about all full-time job openings; (ii) an obligation to provide notice of such job openings to organizations which have requested to be placed on the station's "mailing list;" and (iii) an obligation to engage in a minimum number of non-vacancy specific "menu" options that are intended to expand employment opportunities generally. In addition, the performance of these obligations must be recorded in great detail, then that detailed data must, in turn, be checked for currency, and then be tabulated and those tabulations must be converted into reports that will be placed in a station's public inspection file, posted on its web site, and ultimately, filed with the Commission. Each time a non-exempt SEU has a full-time opening to fill, the recruiting component is triggered along with the first two prongs and attendant recordkeeping and reporting requirements. The disincentive for stations to practice the widest possible outreach and to fill every full-time position is apparent under the new EEO Rule:

1. For each full-time opening that will be filled, each non-exempt SEU must keep a copy of every job vacancy announcement, with the effect that the greater the number of announcements distributed, the greater the amount of recordkeeping that will be required.
2. For each full-time opening that will be filled, each non-exempt SEU must keep detailed information identifying to whom each announcement was sent, with the effect that the wider the dissemination, the more recordkeeping that will be required.
3. For each full-time opening that will be filled, each non-exempt SEU must keep detailed information identifying the dates and times that media, including the Internet, were used to publicize each announcement, with the effect that the more diverse and frequent the dissemination, the more recordkeeping that will be required.
4. For each organization that has asked the broadcaster to send it job vacancy information (a “Referral Organization”), each non-exempt SEU must keep detailed information identifying the organization, contact person and contact information, with the effect that the greater the number of organizations responding, the more information the station needs to keep track of, increasing the opportunity for error and increasing the amount of recordkeeping that will be required.
5. For each full-time opening that is to be filled, each non-exempt SEU must keep detailed information as to which Referral Organizations and other organizations were sent what announcements, with the effect that the more diverse and frequent the dissemination, the more recordkeeping that will be required.

6. For each full-time opening filled, each non-exempt SEU must record and report to the FCC all vacancies filled during the preceding year, with the effect that the greater the number of vacancies filled, the greater the amount of recordkeeping and reporting that will be required.
7. For each full-time opening filled, each non-exempt SEU must record and report to the FCC all outreach sources and methodologies (including name, address, contact person and telephone number) used to recruit for the vacancy, with the effect that the greater the number of sources and methodologies used, the greater the amount of recordkeeping and reporting that will be required.
8. For each full-time opening filled, each non-exempt SEU must record and report to the FCC the outreach source that referred the hire, with the effect that the greater the number of full-time hires, the greater the amount of recordkeeping and reporting.
9. For each full-time opening filled, each non-exempt SEU must record and report to the FCC data reflecting the total number of persons interviewed for the vacancy and the total number of interviewees from each source used to recruit for the vacancy, with the effect that the greater the number of interviews, the greater the amount of recordkeeping and reporting that will be required.
10. For each non-vacancy specific “menu” option initiative, each non-exempt SEU must document and compile a list containing a brief description, with the effect that the greater the number of initiatives, the greater the amount of recordkeeping and reporting that will be required.

In short, every time a station has a full-time job opening to fill, the act of trying to fill the opening will trigger the need to comply with numerous paperwork and other requirements which, in turn, will create an event of exposure to FCC and third-party scrutiny. The Commission's refusal to accept the State Associations' "Internet Plus" proposal with its real time, geographic, and paperless efficiencies as an acceptable, uniform, standardized dissemination methodology, greatly exacerbates the problem. Broadcasters who are already thinking about the need for new hires, will now have one more risk adverse justification for avoiding making additional hires. That disincentive would be driven deeper into staff ranks if the mandatory recruitment, recordkeeping, and reporting requirements of the new EEO Rule were expanded to include part-time positions.

As the last piece of background before considering the arguments of those who urge the Commission to extend the outreach, recordkeeping, and reporting requirements of the new EEO Rule to part-time positions, the Commission should appreciate the substantial number of staff-intensive tasks that a broadcaster must perform as a result of the new EEO Rule.

It is common knowledge that the act of hiring an employee is a time consuming, resource intensive undertaking beginning with determining the duties and qualifications of the position, and then continuing with crafting the job vacancy notice, disseminating information about the opening far and wide, reviewing the applications received, following-up with the applicants as necessary, evaluating applicants for selection as prospective interviewees, conducting the interviews, checking references, hiring, training, mentoring, etc. And this is what is required to complete the task of filling only a single job vacancy. The more openings, the more this process must be repeated, and the more time consuming and resource intensive the matter becomes. The

approach adopted by the Commission under its new EEO Rule will add considerably to the hiring tasks to be performed by broadcasters:

1. Since the FCC's requirement sets forth a goal but not a standard to determine what will constitute "wide," "broad" and "inclusive" dissemination, SEU's will be pressured to build lists of hundreds upon hundreds of organizations, middleman "referral sources," totals well in excess of those organizations which can reasonably be expected to ask to be placed on an SEU's "mailing list" of openings. A data base would have to be developed and/or expanded, containing, for each such organization, the name of the organization as well as its mailing address, telephone number, fax number, e-mail address and the name of a contact person, if any. The time and effort to contact each of these organizations, to determine their interest, to obtain permission to make "Internet public" their referral source status and full contact information, to receive the contact data from them, and to produce or expand the data base realistically could take between a week and a month depending upon staff availability and, of course, depending upon the number of organizations to be contacted.

2. When a triggering opening occurs, the SEU must draft the notice and send the notice to each of these organizations on its master list. Before doing so, the SEU must check to make sure that the list is current, with organizations added or dropped, with contact information updated, etc. That task could range from a day to several days depending upon the currency of the list and the staff available.

3. Once the list has been confirmed as correct and complete, the task of disseminating the notice could be as simple as sending the notice through an electronic listserv containing the names of hundreds of organizations or as time consuming and costly as having to mail notices to all of these organizations. Evidence of the dissemination would have to be created and

maintained. It is estimated that these tasks could take anywhere from minutes to half a day or more, for each opening, once again depending upon the number of organizations involved, the availability of staff, etc.

4. Upon receiving inquiries, resumes and applications as a result of its outreach efforts, the SEU must, as a practical matter, determine the source of each applicant (not just of interviewees) so that it can begin to assess how productive each listed referral organization has been. FCC Form 396-A warns SEU's that they may not rely upon nonproductive sources. FCC Form 396 requires SEU's to tell the Commission what problems, if any, they have encountered in their recruitment efforts. Depending upon how many openings an SEU has, how many organizations were on the mailing list and how many applications were received, this effort to determine the referral source of all applicants as well as to determine why no applicants may have been referred by many of the potentially hundreds of organizations on the list, could realistically occupy one or more staff persons on a full-time basis.

5. Because of the Commission's "referral source-centric" approach, there would be pressure on SEU's to interview even applicants who are not qualified so that no one could claim that the SEU had discriminated against a particular referral source or sources because it did not interview any or enough of "their" referrals. Depending upon the number of openings and the number of applications received, this pressure could enlarge the selection and interview process substantially, extending the process from days to weeks, all because of the Commission's over-emphasis on intermediary referral sources, rather than on job applicants.

6. The drafting, finalization, filing and posting of the annual EEO Public File Report could take a week or more depending upon the number of openings during the year, the number of referral sources used, the changes in contact information from those sources and the staff

available. An SEU would have to take into account that the referral sources used for each opening may be different since there would be additions and subtractions from the master list, as well as changes in contact information between the time the master list was used for one opening and later for another. An SEU would also have to take into account that its Report would be in the public domain for a year since the Report would have to be placed in the SEU's station public inspection files and be posted on its web site(s). An SEU would know that the Commission or a third party may use the Report to call referral organizations to verify the contact information and the fact that notice of a particular opening was received by it. (The potential for disputes over whether a notice was sent versus whether someone at the organization remembers receiving it is real and staggering, thereby casting serious doubt on the workability of the requirement that the contact information for individuals rather than organizations be retained and annually publicized). Accordingly, an SEU would also feel pressure to re-check the currency of the individual and other contact information for all referral sources used for all of the openings to reduce the risk that the Commission or a third party would call a particular organization and learn that the contact person is no longer with the organization even though the data in the report was correct when it was drafted and finalized. Such care would not eliminate the possibility that the contact person left the organization right after the report was updated and finalized. These efforts, depending upon all the factors mentioned above, could substantially increase manpower and the length of time needed to finalize, file, and post each annual EEO Public File Report.

It is evident from the discussion above that performance of the many regulatory induced tasks will require additional substantial staff time and impose major recordkeeping and reporting burdens on broadcasters, particularly on smaller and mid-sized broadcasters. Even the most conservative estimates indicate that performance of all of the tasks reasonably related to the

requirements of the new EEO Rule will require between 1 and 2 full-time staff persons, not including the need to detail more staff on an as needed basis. Accordingly, simple arithmetic compels the conclusion that any effort to expand the applicability of the new EEO Rule to part-time positions – positions which turn over much more frequently than full-time positions – will increase *dramatically* the staff time and personnel needed to properly perform all of the tasks required under the new EEO Rule.

DISCUSSION

I. THE PROPONENTS OF EXTENDING THE NEW EEO RULE TO PART-TIME POSITIONS PRESENT NO MERITORIOUS JUSTIFICATION FOR THE COMMISSION TO DEPART FROM ITS HISTORICAL FOCUS ON FULL-TIME POSITIONS.

Together, those who urge the Commission to extend all of the recruitment, recordkeeping and reporting requirements of the new EEO Rule to part-time positions make essentially the following arguments:

1. That the Commission is statutorily compelled to extend all aspects of the new EEO Rule to part-time positions.
2. That part-time positions are a useful gateway for people to become introduced to careers in broadcasting.
3. That the extension of the recruitment, recordkeeping and reporting requirements of the new EEO Rule will not create any “appreciable” burden on broadcasters.
4. That broadcasters will seek to evade the requirements of the new EEO Rule by using more part-time employees than full-time employees, including reducing the hours of full-time employees to part-time status.

5. That the extension of the recruitment, recordkeeping and reporting requirement of the new EEO Rule will actually minimize the regulatory burden on broadcasters.

None of these arguments, either alone or together, provides sufficient justification for the Commission to extend the new EEO Rule's recruitment, recordkeeping, and reporting requirements to part-time positions.

A. No Statute Compels The Commission To Extend The EEO Rule To Part-time Positions

The State Associations addressed and disposed of this argument in their opening Joint Comments. Accordingly, they are incorporated by reference herein.

B. The Fact That Part-Time Positions May Serve As A Gateway To A Career In Broadcasting Is Not Determinative

The State Associations do not deny the valuable contributions made by part-time employees at stations throughout the United States. And yes, these positions can serve as a gateway for promotions into full-time positions at stations. However, this gateway status is not determinative. First, the Commission has a longstanding policy of focusing primarily on full-time positions.¹ As the Commission stated as recently as 2000 when it adopted the formulation of its previous EEO Rule, “[w]e see no reason to depart from this policy [of exempting part-time hires], which serves to minimize burdens on broadcasters, especially smaller broadcasters.”²

Part-time positions have always been secondary under the Commission's EEO Rules and should

¹ See, e.g., *Second Report and Order and Third Notice of Proposed Rulemaking*, MM Docket No. 98-204, FCC 02-233 (rel. Nov. 20, 2002); see, also, *Enterprise Media of Toledo, L.P.*, 12 FCC Rcd 3920 at ¶10 (1997); *KNOE, Inc.*, 11 FCC Rcd 19655 at ¶17 (1996); *Southern Skies Corporation*, 11 FCC Rcd 19176 at ¶12 (1996); *WFSQ (FM)*, 7 FCC Rcd 6045 at ¶8 (1992).

remain that way. Moreover, the Commission has always been aware of the gateway status of part-time positions and has repeatedly concluded that these positions should not be included as part of its EEO review.³ Second, the new EEO Rule already provides a strong incentive for stations to broadly recruit for part-time positions in order to avoid the time delay in promoting part-time persons to full-time ranks. Both AWRT and NOW, *et al.* acknowledge this strong regulatory incentive.⁴

C. The Extension Of The New EEO Rule To Part-Time Positions Will Increase Significantly The Burdens And Risks For All Broadcasters

Those who support the extension of the new EEO Rule requirements to part-time positions claim that this will not create any new burdens on broadcasters. For example, the EEO Supporters casually state in their Comments that a well designed EEO program requires “almost no labor.”⁵ This misguided claim could not be further from the truth, and is inconsistent with the record and with any plain understanding of how the new EEO Rule will actually work. As pointed out above, the regulatory-induced tasks to be performed, and the staff required to perform those tasks are substantial. The whole problem flows from the Commission rejection of the State Associations’ “Internet Plus” direct communications with applicants proposal and its choice of an approach which is uncertain as to what constitutes compliance and which relies heavily upon hundreds and hundreds of middlemen referral sources to carry the message of jobs to applicants. The result is enormous unnecessary and counterproductive recordkeeping,

² See *Report and Order*, 15 FCC Rcd 2329 at ¶ 110 (2000), *recon. denied*, 15 FCC Rcd 22548 (2000).

³ See *supra* n.2.

⁴ See Comments of NOW, *et al.* at 8; Comments of AWRT at 4.

⁵ Comments of EEO Supporters at 10.

reporting, and risk event disincentives to any effort to widely, repeatedly, and diversely disseminate information about job openings and to fill job openings. Thus, it is clear that the burdens and risks on broadcasters increase significantly with every turnover, and will further increase with the increased turnover rate inherent in part-time positions. The information provided above, coupled with the system of disincentives built into the Commission's current approach, completely undermine any suggestion that extending the requirements of the new EEO Rule to part-time positions will be inconsequential for broadcasters. The reality is quite to the contrary.

D. The Argument That Broadcasters Will Seek To Evade The Requirements Of The New EEO Rule Unless It Is Applied To Part-time Positions Is Not Responsive To The Problem

Those who support extension of the new EEO Rule to part-time positions claim that stations will seek to evade the requirements of the new EEO Rule by reducing the hours of full-time employees, and by hiring part-time employees instead of full-time employees. There are several problems with this argument.⁶ First, every broadcaster is aware that they benefit whenever they have an adequate pool of qualified applicants to consider. Thus they have a strong incentive to recruit for all positions. If an incentive exists to avoid the requirements of the new EEO Rule, it has nothing to do with outreach. Rather it has to do with the fact that very labor-intensive recordkeeping and reporting requirements are triggered by every opening, and that if such recordkeeping and reporting are not completely in order for all applicable positions,

⁶ It is important to note at the outset that the Commission long ago rejected "the idea that licensees might evade our rules through the use of numerous part-time employees, this would be most unusual and unduly burdensome and expensive for the broadcaster." *Amendment of Broadcast Equal Employment Opportunity Rules and FCC Form 395*, 70 FCC 2d 1466 at ¶24 (1979).

even truly broad and inclusive outreach will not save a station against allegations based on paperwork shortcomings. The flaw in the Commission's approach is that the more diligent the broadcaster is in terms of the types of dissemination techniques employed and the number of referral sources used, the more recordkeeping and reporting there is. Second, if the proponents are correct that this incentive actually exists, the consequences of that incentive will not stop at the door of part-time positions. Rather, under their own argument, more temporary help will be enlisted by stations. More tasks will be outsourced. There will be more LMAs and more consolidation. All of this will mean less jobs. The solution is to fix the rule, not extend its reach.

The real problem is that the Commission has rejected the State Associations' "Internet Plus" approach which insures direct, convenient, effective and efficient communication of job vacancy information to applicants and replaced it with a scheme that essentially requires SEU's to rely not only on middlemen organizations which have affirmatively shown some interest in playing the productive referral role (by requesting to be placed in the SEU's mailing list), but also on literally hundreds and hundreds of other middlemen organizations whose interest is questionable at best, all this to approach some unspecified, uncertain and thus unattainable level of "inclusiveness." In the process, the Commission has denigrated the importance of direct communications between station and applicant and dramatically added to the paperwork and reporting burdens of broadcasters with no real benefit. The solution is adoption of the State Associations' "Internet Plus" proposal. Under the plan, the Commission would be encouraging (i) direct communications between stations and applicants, (ii) use of referral sources which have demonstrated an actual desire to help to perform a referral role and to help fill any "inclusiveness" gaps and (iii) positive action by stations, through the credit program, to do even more in their communities and elsewhere to develop an awareness of the value of a broadcasting

career and to help jump start careers through job fairs, education, scholarships, mentoring, training, etc.

E. It Is Absurd To Think That The Extension Of The Recruitment, Recordkeeping, And Reporting Requirements Of The New EEO Rule Will Actually Minimize The Regulatory Burden On Broadcasters

NOW, *et al.* argues that extension of the new EEO Rules tripartite requirements may “actually minimize” the regulatory burden on broadcasters.⁷ That position is ridiculous. It is true that an SEU could use the same list of referral organizations (both “eligible” referral organizations and others) for its part-time positions as it does for its full-time employees. However, those lists, as evidenced by the lists compiled by many of the State Associations, contain upwards of some 700 referral organizations. As shown above, the more openings, whether full-time or part-time, the more time and cost involved in sending notices, keeping records, checking and double checking data (name and telephone number of “contact persons” for each organization), tabulating the data, completing the reporting, etc. And as demonstrated above, that burden is substantial even without extending the new EEO Rule to part-time employees.

There is disagreement in the record about what percentage of station employee positions are part-time. For example, in its Comments, the NAB relies upon statistics provided by the U.S. Department of Labor which indicate that part-time employees comprise only 8.77% of broadcast industry positions.⁸ On the other hand, AWRT estimates that part-time positions account for

⁷ Comments of NOW, *et al.* at 8.

⁸ See NAB Comments at 3. Even assuming for the sake of argument that part-time employees make up a greater amount of the broadcast workforce, such higher numbers would substantially increase the burden on broadcasters. In any case, the Commission has historically relied on Labor Department data and should continue to do so here. *See,*

between 10% to 30% of all positions.⁹ The EEO Supporters claim the figure is at least 17%.¹⁰ Regardless of who is correct, either the significance for extending all requirements of the new EEO Rule to part-time positions has simply not been shown, or any theoretical value in extending all requirements of the new EEO Rule to part-time positions is clearly outweighed by other factors. At bottom, if the Commission were to give serious consideration to expanding the applicability of the new EEO Rule to part-time positions, it must first reconsider its approach in light of the constructive alternative advanced by the State Associations in their “Internet Plus” proposal, as well as consider enlarging the number of SEU’s which should be exempt under both the full-time and part-time requirements.

II. A DECISION NOT TO EXTEND THE NEW EEO RULE REQUIREMENTS TO PART-TIME POSITIONS ELIMINATES THE NEED FOR THE COMMISSION TO DEAL WITH A NUMBER OF THORNY ISSUES

If the Commission were to extend the new EEO Rule to part-time positions, it would have to resolve the following issues:

1. What should be the minimum hours for a part-time position?

e.g. Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, 17 FCC Rcd 12985 (2002) (price of residential mobile telephone service); *Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, 14 FCC Rcd 20156 (1999) (comparison of wage rate differentials for communications workers); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 FCC Rcd 4358 (1997) (cable subscribership data); *Clarification of Commission Policies Regarding Spousal Attribution*, 7 FCC Rcd 1920 (1992) (spousal income levels); *Progressive Communications*, 3 FCC Rcd 386 (1988) (employment positions held by college professors).

⁹ Comments of AWRT at 2, fn.3.

¹⁰ Comments of EEO Supporters at 5.

It is clear what the minimum hours for a permanent, full-time employee are, namely 30 hours per week on a regular basis. Accordingly, any permanent employee who works less than 30 hours per week should be assumed to be a part-time employee. NTCA suggests that a part-time employee should be one who works 25 or more hours per week but less than 30 hours per week on a regular basis. AWRT suggests that the minimum be 15 hours per week. Clearly there is a minimum level below which the position appears inconsequential from an operational standpoint and on the cusp of being viewed as a temporary position which would not be subject to the new EEO Rule. Query whether AWRT and NOW, *et al.* are pushing the Commission down a slippery slope toward seeking to place temporary employees and even employees of contractor services under the new EEO Rule? The State Associations urge extreme caution, with that caution beginning with a ruling that part-time employees should not be subject to the recruitment, recordkeeping and reporting requirements of the new EEO Rule.

2. What would constitute “substantial compliance?”

The NAB suggests that the Commission use a former “substantial compliance” policy in this area.¹¹ The problem is that while the concept may seem innocuous, it is an invitation for perpetual uncertainty, disputes, and litigation. Stations need to know what is truly expected of them before the Commission can reasonably expect that its regulations will work as intended. Furthermore, legal principles of fundamental fairness require clarity in this area before the Commission can even begin to enforce its regulations.

3. If part-time positions are included, what effect should this have on the “less than 5 full-time employees” exemption for SEU’s?

¹¹ Comments of NAB at 3.

The current exemption for SEU's with "less than 5 full-time employees" is premised on the fact that part-time employees are not covered by the recruitment/recordkeeping/reporting requirements of the new EEO Rule. If part-time positions were added to the mix, as a matter of logic and fairness, the standard for exemption should be broadened to a level substantially higher than 5 full-time employees, for example, less than 20 full-time employees.

III. APPLICATION OF THE NEW EEO RULE TO PART-TIME POSITIONS WILL ADD FURTHER PRESSURE ON STATIONS TO OUTSOURCE AS MANY OF THEIR FUNCTIONS AS POSSIBLE, TO ENTER INTO LMA'S, AND TO CONSOLIDATE

The fact that the mandatory recruitment, recordkeeping, and reporting requirements will work at cross-purposes to the goal of widest possible and most frequent dissemination should be plain. Inescapably, broadcasting is a business. Its advertisers have many options for their messages. Its audience has many other options for information and entertainment. If the revenues of a radio or television station do not meet or exceed expenses on a regular basis, the owner is faced with doing things that it can readily control such as cutting costs, going dark, or selling out. Employee payroll is the largest component of expense for virtually every business, including broadcasting. The broadcast industry's unavoidable preoccupation with keeping revenues above expenses already forces broadcasters to look for ways to reduce expenses everywhere they can. Employee layoffs are a classic response. A decision not to re-staff after layoffs is a further hold-the-line-on-expenses response. Hiring part-time employees rather than full-time employees is another way to save money. Taking on temporary employees, rather than permanent full-time or part-time workers, is another response. A decision to outsource as many of its operations is another. In the area of programming, outsourcing a station's programming

needs to syndicators, rather than using live programming, is already a trend. Combining operations through LMA's and consolidating ownership are also trends.

If the Commission truly cares about the health of the broadcast industry and about expanding opportunities for broadcast employment generally, it needs to focus on ways to create a regulatory environment that makes it easier for broadcasters to survive and compete, particularly smaller broadcasters, so that such broadcasters have the economic need to hire more people. At the least, the Commission must avoid taking any actions that would discourage stations from creating new jobs. For these reasons alone, the Commission should, on its own initiative, revisit its *Second R&O*. At the least, the Commission should not compound the problem by extending its mandatory recruitment, recordkeeping, and reporting requirements to part-time positions where the incidence of turnover is very high.

The organizations which continue to urge the Commission to re-adopt worn EEO regulations, and now to expand the applicability of those EEO regulations to part-time positions, have lost sight of what really counts – job creation. The Commission's regulations do not create industry jobs. Only a healthy business and favorable regulatory climate will do that. Equally certain is that unwarranted and counterproductive regulations, as here, will deter the creation of new jobs and speed the further elimination of jobs in the broadcast industry by placing more pressure on stations to consolidate. Those logical consequences undermine the basic premise for the entire *Second R&O*, namely that equal employment opportunity only has meaning when there are job openings for which to apply.

The Commission professes to be concerned about the effects of consolidation. Yet at the same time that the Commission is engaged in measuring the effects of consolidation and trying to strengthen individual and smaller group station ownership, so that these owners can survive

and compete in the marketplace without having to sell out and consolidate, the Commission seriously undercuts this effort by injecting a new regulatory disincentive for stations to stay independent. The large group owners typically have the resources to bear even the unreasonable burdens of extensive and time consuming recordkeeping and reporting as well as governmental scrutiny. Smaller owners cannot afford either the staff required to meet those unreasonable burdens or the forfeitures likely to arise from EEO-related paperwork shortcomings. Extending these burdens and risks to part-time positions will only exacerbate the problem, resulting in increased consolidation and less competition in the broadcast industry.

CONCLUSION

Based on the foregoing, the State Associations respectfully urge the Commission not to extend the applicability of the mandatory recruitment, recordkeeping, and reporting requirements of the new EEO Rule to part-time positions.

Respectfully submitted,

Alabama Broadcasters Association,
Alaska Broadcasters Association,
Arizona Broadcasters Association,
California Broadcasters Association,
Colorado Broadcasters Association,
Connecticut Broadcasters Association,
Florida Association of Broadcasters,
Georgia Association of Broadcasters,
Hawaii Association of Broadcasters,
Idaho State Broadcasters Association,
Illinois Broadcasters Association,
Indiana Broadcasters Association
Iowa Broadcasters Association,
Kansas Association of Broadcasters,
Kentucky Broadcasters Association,
Louisiana Association of Broadcasters,
Maine Association of Broadcasters,
Maryland/ DC/Delaware Broadcasters
Association,
Massachusetts Broadcasters Association,
Michigan Association of Broadcasters,
Minnesota Broadcasters Association,
Missouri Broadcasters Association,
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Nevada Broadcasters Association,
New Hampshire Association of
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New Jersey Broadcasters Association,
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Ohio Association of Broadcasters,

Oklahoma Association of Broadcasters,
Oregon Association of Broadcasters,
Pennsylvania Association of Broadcasters,
Rhode Island Association of Broadcasters,
South Carolina Broadcasters Association,
South Dakota Broadcasters Association,
Tennessee Association of Broadcasters,
Texas Association of Broadcasters
Utah Broadcasters Association,
Vermont Association of Broadcasters,
Virginia Association of Broadcasters,
Washington State Association of
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February 3, 2003

By: /s /
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CERTIFICATE OF SERVICE

I, Julia Colish, a secretary with the law firm of Shaw Pittman LLP, hereby certify that copies of the foregoing “**JOINT REPLY COMMENTS ON THIRD NOTICE OF PROPOSED RULE MAKING**” were served via U.S. mail on this 3rd day of February 2003 on the following:

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*Via Hand Delivery